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8

9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
11

12 GREGORY ALAN MONTEGNA,  
13 individually and on behalf of all others  
similarly situated,

14 Plaintiffs,  
15  
16

17 vs.  
18

18 PORTFOLIO RECOVERY  
ASSOCIATES, LLC,

19 Defendant.  
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21  
22  
23  
24  
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26  
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CASE NO. 12-cv-00764-MMA-BGS

**ANSWER TO FIRST AMENDED  
COMPLAINT**



1 Defendant PORTFOLIO RECOVERY ASSOCIATES, LLC (“Defendant”)  
2 hereby submits the following Answer to the First Amended Complaint filed in this  
3 action by plaintiff GREGORY ALAN MONTEGNA (“Plaintiff”):

4 1. In answering Paragraph 1 of the Complaint, Defendant admits that  
5 Plaintiff brings this action for alleged illegal actions of Defendant and its related  
6 entities, subsidiaries and agents pursuant to California Penal Code §§ 630, *et seq.*  
7 Defendant denies that there is any legitimate basis under Rule 23 of the Federal Rules  
8 of Civil Procedure to certify a class in this case. Except as herein admitted, the  
9 remaining allegations of Paragraph 1 are denied.

10 2. In answering Paragraph 2 of the Complaint, Defendant avers that the  
11 contents of California Penal Code § 632 are self-explanatory. Except as herein  
12 admitted, the remaining allegations of Paragraph 2 are denied.

13 3. In answering Paragraph 3 of the Complaint, Defendant admits that  
14 Plaintiff alleges that jurisdiction arises pursuant to 28 U.S.C. § 1332. Defendant  
15 admits on information and belief that Plaintiff is a resident of California and further  
16 admits that Defendant is a resident of Norfolk, VA. Defendant denies that there is  
17 any legitimate basis under Rule 23 of the Federal Rules of Civil Procedure to certify a  
18 class in this case. Except as herein admitted, the remaining allegations of Paragraph 3  
19 are denied.

20 4. In answering Paragraph 4 of the Complaint, Defendant admits that  
21 Plaintiff alleges venue is proper pursuant to 28 U.S.C. §§ 1391(b) and 1441(a).  
22 Defendant admits that it has, at times, done business within the State of California  
23 and the County of San Diego. Except as herein admitted, the remaining allegations of  
24 Paragraph 4 are denied.

25 5. In answering Paragraph 5 of the Complaint, Defendant admits on  
26 information and belief that Plaintiff is a resident of the county of San Diego in the  
27 State of California. Except as herein admitted, the remaining allegations of Paragraph  
28 5 are denied.



1           6.     In answering Paragraph 6 of the Complaint, Defendant admits that it is a  
2 limited liability corporation whose primary corporate address is in Norfolk, VA.  
3 Defendant admits that it has, at times, recorded or monitored telephone conversations  
4 between it and members of the public, including California residents. Except as  
5 herein admitted, the remaining allegations of Paragraph 6 are denied.

6           7.     In answering Paragraph 7 of the Complaint, Defendant admits that it is a  
7 limited liability corporation. Except as herein admitted, the remaining allegations of  
8 Paragraph 7 are denied.

9           8.     In answering Paragraph 8 of the Complaint, Defendant admits on  
10 information and belief that Plaintiff is an individual residing within the State of  
11 California.

12           9.     Denied.

13           10.    In answering Paragraph 10 of the Complaint, Defendant denies that it  
14 spoke to this Plaintiff on March 19, 2012, admits that the Defendant sought to speak  
15 with the Plaintiff on a personal business matter, and denies that the Plaintiff did not  
16 consent to the recording of communications. Except as herein admitted, the  
17 remaining allegations of Paragraph 10 are denied.

18           11.    Denied.

19           12.    Denied.

20           13.    Denied.

21           14.    Denied.

22           15.    Defendant denies that there is any legitimate basis under Rule 23 of the  
23 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
24 the allegations of Paragraph 15 of the Complaint.

25           16.    Defendant denies that there is any legitimate basis under Rule 23 of the  
26 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
27 the allegations of Paragraph 16 of the Complaint.

28           17.    Defendant denies that there is any legitimate basis under Rule 23 of the



1 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
2 the allegations of Paragraph 17 of the Complaint.

3 18. Defendant denies that there is any legitimate basis under Rule 23 of the  
4 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
5 the allegations of Paragraph 18 of the Complaint.

6 19. Defendant denies that there is any legitimate basis under Rule 23 of the  
7 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
8 the allegations of Paragraph 19 of the Complaint.

9 20. Defendant denies that there is any legitimate basis under Rule 23 of the  
10 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
11 the allegations of Paragraph 20 of the Complaint.

12 21. Defendant denies that there is any legitimate basis under Rule 23 of the  
13 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
14 the allegations of Paragraph 21 of the Complaint.

15 22. Defendant denies that there is any legitimate basis under Rule 23 of the  
16 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
17 the allegations of Paragraph 22 of the Complaint.

18 23. Defendant denies that there is any legitimate basis under Rule 23 of the  
19 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
20 the allegations of Paragraph 23 of the Complaint.

21 24. Defendant denies that there is any legitimate basis under Rule 23 of the  
22 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
23 the allegations of Paragraph 24 of the Complaint.

24 25. Defendant denies that there is any legitimate basis under Rule 23 of the  
25 Federal Rules of Civil Procedure to certify a class in this case, and therefore denies  
26 the allegations of Paragraph 25 of the Complaint.

27 26. In answering Paragraph 26 of the Complaint, Defendant incorporates by  
28 reference paragraphs 1 through 25 above as if fully set forth herein.



1           27. In answering Paragraph 27 of the Complaint, Defendant avers that the  
2 contents of the California Constitution, California Penal Code § 632, and *Kearny v.*  
3 *Salmon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006), are self-explanatory. Except as  
4 herein admitted the remaining allegations of Paragraph 27 are denied.

5           28. In answering Paragraph 28 of the Complaint, Defendant avers that the  
6 contents of California Penal Code § 632 are self-explanatory. Except as herein  
7 admitted, the remaining allegations of Paragraph 28 are denied.

8           29. Denied.

9           30. Denied.

10          31. Denied.

11          32. Denied.

12          33. Denied.

13          34. In answering Paragraph 34 of the Complaint, Defendant denies all  
14 allegations therein and denies that Plaintiff and the members of the putative class are  
15 entitled to any relief requested.

16          35. In answering Paragraph 35 of the Complaint, Defendant avers that no  
17 response is required of it.

18          36. In answering Paragraph 36 of the Complaint, Defendant incorporates by  
19 reference paragraphs 1 through 35 above as if fully set forth herein.

20          37. Denied.

21          38. Denied.

22          39. Denied.

23          40. Denied.

24          41. Denied.

25          42. Denied.

26          43. In answering Paragraph 43 of the Complaint, Defendant incorporates by  
27 reference paragraphs 1 through 42 above as if fully set forth herein.

28          44. Denied.



1 45. Denied.

2 46. Denied.

3 47. Denied.

4 48. In answering Paragraph 48 of the Complaint, Defendant incorporates by  
5 reference paragraphs 1 through 47 above as if fully set forth herein.

6 49. Denied.

7 50. Denied.

8 51. Denied.

9 52. In answering Paragraph 52 of the Complaint, Defendant denies all  
10 allegations therein and denies that Plaintiff is entitled to any relief requested.

11  
12 **AFFIRMATIVE DEFENSES**

13 As and for separate affirmative defenses to the Complaint, Defendant alleges as  
14 follows:

15  
16 **FIRST AFFIRMATIVE DEFENSE**

17 **(Failure to State a Claim)**

18 The allegations of the Complaint fail to state a claim against Defendant upon  
19 which relief can be granted.

20  
21 **SECOND AFFIRMATIVE DEFENSE**

22 **(Statute of Limitations/Laches)**

23 The purported claims set forth in the Complaint are barred in whole or in part  
24 by the applicable statutes of limitation and/or the equitable doctrine of laches.

25  
26 **THIRD AFFIRMATIVE DEFENSE**

27 **(Unclean Hands)**

28 The allegations in the Complaint and relief requested are on information and



1 belief barred in whole or in part by the doctrine of unclean hands.

2  
3 **FOURTH AFFIRMATIVE DEFENSE**

4 **(No Willful Conduct)**

5 Defendant acted in good faith at all times in its dealings with Plaintiff, and if  
6 any conduct by Defendant is found to be unlawful, which Defendant expressly  
7 denies, such conduct was not willful and should not give rise to liability.

8  
9 **FIFTH AFFIRMATIVE DEFENSE**

10 **(Failure to Mitigate)**

11 Plaintiff, although under a legal obligation to do so, has failed to take  
12 reasonable steps to mitigate any alleged damages that he may have and is therefore  
13 barred from recovering damages, if any, from Defendant.

14  
15 **SIXTH AFFIRMATIVE DEFENSE**

16 **(Waiver)**

17 Plaintiff has waived his rights, if any, to recover the relief he seeks in the  
18 Complaint based upon his own conduct and admissions with respect to the financial  
19 obligation at issue.

20  
21 **SEVENTH AFFIRMATIVE DEFENSE**

22 **(Good Faith)**

23 Defendant has, at all material times with respect to Plaintiff, acted in good faith  
24 in an effort to comply fully with all relevant federal and state laws.

25  
26 **EIGHTH AFFIRMATIVE DEFENSE**

27 **(Apportionment)**

28 Without admitting that any damages exist, if damages were suffered by



1 Plaintiff as alleged in the Complaint, those damages were proximately caused by and  
2 contributed by persons other than Defendant. The liability, if any exists, of  
3 Defendant and/or any responsible parties, named or unnamed, should be apportioned  
4 according to their relative degrees of fault, and the liability of Defendant should be  
5 reduced accordingly.

6  
7 **NINTH AFFIRMATIVE DEFENSE**

8 **(Supervening Cause)**

9 The causes of action in the Complaint are barred, in whole or in part, to the  
10 extent that any injury or loss sustained was caused by intervening or supervening  
11 events over which Defendant has or had no control.

12  
13 **TENTH AFFIRMATIVE DEFENSE**

14 **(Equitable Indemnity)**

15 To the extent that Plaintiff has suffered any damage as a result of any alleged  
16 act or omission of Defendant, which Defendant denies, Defendant is entitled to  
17 equitable indemnity according to comparative fault from other persons and/or entities  
18 causing or contributing to such damages, if any.

19  
20 **ELEVENTH AFFIRMATIVE DEFENSE**

21 **(Commerce Clause)**

22 Defendant's conduct is subject to the Commerce Clause of the United States  
23 Constitution. Plaintiff's proposed interpretation of provisions of the California Penal  
24 Code must be rejected as it would place an unreasonable restraint upon interstate  
25 commerce, thereby raising serious constitutional issues.

26 //

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**TWELFTH AFFIRMATIVE DEFENSE**

**(Justification)**

Defendant's conduct was justified because it substantively furthered one or more countervailing interests.

WHEREFORE, Defendant requests judgment as follows:

1. That Plaintiff takes nothing by the Complaint, which should be dismissed with prejudice.
2. That Defendant recovers from Plaintiff costs according to proof.
3. That Defendant recovers attorneys' fees according to proof.
4. That the Court orders such other further reasonable relief as the Court may deem just and proper.

DATED: May 7, 2012

SIMMONDS & NARITA LLP  
TOMIO B. NARITA  
JEFFREY A. TOPOR

By: s/Jeffrey A. Topor  
Jeffrey A. Topor  
Attorneys for Defendant  
Portfolio Recovery Associates, LLC



**PROOF OF SERVICE**

I, Jeffrey A. Topor, hereby certify that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816. I am counsel of record for the defendant in this action.

On May 7, 2012, I caused the **ANSWER TO FIRST AMENDED COMPLAINT** to be served upon the parties listed below via the Court's Electronic Filing System:

**VIA ECF**

Abbas Kazerounian, Esq.  
[ak@kazlg.com](mailto:ak@kazlg.com)  
Counsel for Plaintiff

Joshua Swigart, Esq.  
[josh@westcoastlitigation.com](mailto:josh@westcoastlitigation.com)  
Counsel for Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.  
Executed at Baltimore, Maryland on this 7th day of May, 2012.

By: s/Jeffrey A. Topor  
Jeffrey A. Topor  
Attorneys for Defendant  
Portfolio Recovery Associates, LLC